89- 1496

Supreme Court, U.S.
FILED
MAR 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

JAMES WILLIAM GILLIAM II

Petitioner,

v.

NATIONAL COMMISSION ON CERTIFICATION OF PHYSICIAN ASSISTANTS, INC.; PENNSYLVANIA STATE BOARD OF MEDICINE; LINDA D. WIDDOSS; AND THE COMMONWEALTH OF PENNSYLVANIA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner Pro Se

QUESTIONS PRESENTED FOR REVIEW

[1] The first question derives from the Constitution. Does substantial "state action" adhere to a [now] private national professional certification agency, such as the National Commission on Certification of Physician Assistants, Inc. ("NCCPA"), that would serve to invoke "due process" protection of liberty and property interests under the Fifth and Fourteenth amendments to the Constitution, given that the agency in question was founded ~~in~~ a Federal contract and a long and abiding symbiotic relationship with state and Federal government could be definitely established?

[2] The second question is grounded in Federal Statute. Does a state sanctioned monopolistic professional certification agency violate sections of the Sherman Antitrust Act in not serving the "public interest" by its [mandatory] periodic

re-certification examinations wherein failure of the examination carries no penalty, but failure to participate in the process and pay appropriate fees carries the severe penalty of foreclosure of privileges and certifications previously conferred?

[3] The third question arises from the Federal Rules of Civil Procedure. By overlooking or ignoring a proper and timely motion for leave to amend complaint pursuant to Rule 15(a) Fed.R.Civ.P., prior to the dismissal of that complaint with prejudice, did the District Court abuse its discretionary power? And, did the Third Circuit compound the issue in its affirmation of the District Court's ruling contrary to previous holdings of this Court on the same issue, as-well-as conflicting with the Second and Ninth Circuits.

[4] The forth and final question stems from the roots of American legal tradition and common law. By its [pre-trial]

dismissal with prejudice, affirmed by the Third Circuit Court of Appeals, did the District Court violate the deeply ingrained American legal tradition that provides that every person [subject to the jurisdiction of the United States] is entitled to his [own] day in court?

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Letter from William L. Bost, Jr. to David L. Glazer of NCCPA (Nov. 8, 1976) (discussing State Action) Id. at 108. 10

OPINIONS BELOW

On or about February 27, 1990, The United States Court of Appeals for the Third Circuit [Docket No. 89-1992], without written opinion, ORDERED AND ADJUDGED that the judgment of the United States District Court for the Eastern District of Pennsylvania [Civil Action No. 89-1698], (pre-trial dismissal of petitioner's action with prejudice), be affirmed, and is set forth in the appendix at A-1.

The MEMORANDUM AND ORDER of the District Court is set 'forth in the appendix at A-3.

JURISDICTION OF THE COURT

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit under Article III, Sections 1 & 2 of the United States Constitution, 28 U.S.C. Section 1254(1), and 28 U.S.C. Section 1651(a).

****

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution of the United States

Amendment V.

> No person shall . . . [B]e deprived of life, liberty, or property, without due process of law . . .

Amendment XIV.

> Section 1. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

The United States Code

15 U.S.C. Section 1, (1970) provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . .

15 U.S.C. Section 2, (1970) provides in pertinent part:

> [I]t is illegal to . . . monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States.

15 U.S.C. Section 4 provides:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 [Sherman Antitrust Act] of this title; and it shall be the duty of the several United States Attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited.

42 U.S.C. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner [hereinafter Gilliam], commenced his action in the United States District Court for the Eastern District of Pennsylvania in February 1989, seeking damages and injunctive relief from respondent National Commission on Certification of Physician Assistants ("NCCPA") [hereinafter NCCPA]. Gilliam alleges that the NCCPA violated his right to due process under Amendments V. & XIV. to the Constitution. He further alleges that the NCCPA is guilty of violations of the Sherman Antitrust Act as this Act pertains to monopolies and restraint of trade. Gilliam also alleges Title 42 U.S.C. Section 1983 violations on the part of respondents Pennsylvania State Board of Medicine, Linda D. Widdoss, and an unknown counsel to the Board [identified as the Commonwealth] [hereinafter Widdoss].

Gilliam was duly certified by the NCCPA

in 1975. Thereafter, he reregistered his certificate every two (2) years, in the years 1977 and 1979, by means of submission of one-hundred (100) required hours of Continuing Medical Education ("CME").

Gilliam was to sit for his first recertification by examination, an additional requirement beyond the submission of the required CME every two (2) years for reregistration, in 1981. This recertification examination is required every six (6) years. The recertification examinations for the years 1981 thru 1983, had no pass/fail levels (due to lack of validity), however, participation in the process was [and is] "Mandatory" to maintain certification. Gilliam was prevented from participating in any of the recertification examinations for the years 1981 thru 1986, due to military service with the U. S. Army, both in the United States and the Republic of Panama.

Gilliam's certification was foreclosed by the NCCPA on or about September 20, 1982.

Gilliam was informed by the NCCPA in December 1986, that the only means by which he could re-enter their certification system would be to certify de novo by taking and passing the 1987 Physician Assistant National Certifying Examination ("PANCE").

Gilliam did participate in this examination and on or about January 24, 1988, he was informed that he had failed the Clinical Skills Problems ("CSP") portion of that examination, and was therefore deemed to have failed the total examination. In his suit, Gilliam challenges the reliability and validity of this portion of NCCPA's National Certifying Examination. Prior to initiation of this action, Gilliam attempted to appeal to the NCCPA in mitigation and extenuation, but he was denied access to their published appeal process.

Gilliam was denied a license to practice

his profession in the Commonwealth of Pennsylvania due to his lack of a "current" NCCPA certificate. This denial was in spite of the fact that he had practiced in the Commonwealth prior to the enactment of physician assistant regulatory legislation, and at that time was [and is] duly licensed in the State of New York and [was then] currently certified by NCCPA. Gilliam had been allowed to practice in the Commonwealth in excess of one (1) year pending the results of the 1987 National Certifying Examination. Gilliam moved to join Linda D. Widdoss and an unknown counsel to the State Medical Board to his action "as a matter of course" under Rule 15(a) Fed.R.Civ.P. and Title 42 U.S.C. Section 1983, after those individuals, "acting under color of State Law", denied him access to the Pennsylvania State Board of Medicine [meeting in regular session] wherein he could pled his case in mitigation and extenuation.

Upon review of NCCPA's well pled pre-trial motion for dismissal [such motions do not fall within the meaning of "Responsive Pleadings" under Rule 15(a) Fed.R.Civ.P.], Gilliam filed a proper and timely motion for leave to amend his complaint. This motion was filed within ten (10) days of receipt of NCCPA's motion for dismissal. The District Court did not rule on Gilliam's motion for leave to amend [for whatever reason] and after a three (3) month delay granted NCCPA's motion for dismissal, thereby dismissing Gilliam's action with prejudice on November 6, 1989.

Gilliam duly filed an Appeal to the United States Court of Appeals for the Third Circuit [Docket No. 89-1992]. The Third Circuit affirmed the judgment of the District Court [without written or oral opinion] on February 27, 1990.

This Court is Gilliam's final hope for redress in this matter.

REASONS FOR GRANTING THE WRIT

Point I.

SUFFICIENT STATE ACTION ADHERES TO THE NCCPA THAT MANDATES DUE PROCESS PROTECTION OF LIBERTY AND PROPERTY INTERESTS UNDER AMENDMENTS V. AND XIV. TO THE CONSTITUTION.

The NCCPA persists in its allegation, that it is a "private" certification agency. However, it was founded in Federal Contract No.1 AH44110 entitled: "TO ESTABLISH A SYSTEM TO EVALUATE THE COMPETENCY OF ASSISTANTS TO THE PRIMARY CARE PHYSICIAN", under the Division of Associated Health Professions, Bureau of Health Manpower, Health Resources Administration, Department of Health, Education and Welfare.

The NCCPA received Federal funding for the initial six (6) years of its existence [$199,259 in the year 1975 alone][1].

The United States Department of Defense

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1 NCCPA Newsletter, Vol. 1/No.2, April 1976.

("DOD") is a charter member of the NCCPA Board of Directors, DOD representation on the NCCPA Board of Directors continues to this day.

The Federation of State Medical Boards of the United States ("FSMBUS") is likewise represented on the NCCPA Board. A 1976 resolution [passed unanimously] from that body is quoted as follows:[1]

> Whereas the Federation of State Medical Boards of the United States (FSMBUS) is a member organization of the National Commission on Certification of Physician Assistants (NCCPA), and
>
> Whereas the FSMBUS has endorsed the National Certifying Examination for Physician's Assistants developed by the National Board of Medical Examiners and administered by the NCCPA, and
>
> Whereas it is the policy of the FSMBUS to promote state legislation that allows interstate mobility of physicians of the United States, and
>
> Whereas similar problems have arisen concerning physician's assistants,and
>
> Whereas approximately 80% of the states have enacted enabling physician's assistant legislation.

> Therefore, be it resolved that the FSMBUS urge state medical boards to seek legislation and formulate rules and regulations which would permit acceptance of the examination of the NCCPA in the authorization of physician's assistants in their respective states.

The NCCPA wages an ongoing lobbying effort with respect to the Member Boards of FSMBUS, the purpose of which is to "monopolize" the certification of physician assistants within the states. The question of illegal monopoly in violation of the Sherman Act will be dealt with in Point II. Currently, forty (40) of the fifty (50) states require NCCPA certification to practice as a physician assistant, New York and Delaware will be added to this list in the near future. The "only" certification agency recognized by the above states is the NCCPA, and some twenty-three (23) [per NCCPA boast] require that this certification be "current". Dissenting in Jackson v. Metro. Edison Co., 419 U.S. 345 (1974), Justice

Marshall wrote:

> [o]ur state action cases have repeatedly relied on several factors clearly presented by this case: a state-sanctioned monopoly; an extensive pattern of cooperation between the 'private' entity and the state; and a service uniquely public in nature.

Clearly, the NCCPA embraces all of these factors.

In Rochin v. California, 342 U.S. 165, 169 (1952), Justice Frankfurter wrote:

> [t]hese standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized '—Constitutional guarantee of respect for those personal immunities which . . . are so rooted in the traditions and conscience of our people as to be ranked as fundamental or are implicit in the concept of ordered liberty.

In practice, Justice Frankfurter, appears to have meant that any procedure which "shocks the conscience" violates Due Process. Id., 172.

In the "Conclusion" of his letter

to David L. Glazer, Executive Director of NCCPA, dated November 8, 1976, Mr. William L. Bost, Jr. of Cofer, Beauchamp & Hawes wrote:

> [t]he Commission's close relationship to the P.A. qualifying standards set forth in state law indicates that the certifying process may have sufficient indicia of state action so that procedural due process must be afforded a P.A. based on some reasonable criteria. . . .

Significant "state action" does, therefore, adhere to the NCCPA which mandates the provision of due process protection of liberty and property interests under amendments V. & XIV. to the Constitution.

The NCCPA did not and has not afforded Gilliam his rightful due process protections, and this action in the denial of Gilliam's Constitutional right to due process was the most important reason that moved Gilliam to seek redress in our Federal judicial system.

Point II.

NCCPA RECERTIFICATION POLICIES ARE SELF-SERVING AND NOT IN THE PUBLIC INTEREST, THEREBY CONSTITUTING A PER SE VIOLATION OF THE SHERMAN ANTITRUST ACT, AS-WELL-AS FAILING TO SATISFY "RULE OF REASON" CRITERIA. THE INTERSTATE AND MONOPOLISTIC ASPECTS OF THE NCCPA OPERATION VIOLATE 15 U.S.C. SECTIONS 1 & 2.

In 1975, a unanimous Supreme Court held: that the professions are not exempt from the jurisdiction of the Sherman Antitrust Act. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). NCCPA's re-certification examinations, wherein there is no penalty for failure (only penalty for non-participation), fail to meet their stated purpose of protection of the public interest through assurance of continued clinical competence. Therefore, denial or foreclosure of certification (previously conferred) based on non-participation in the NCCPA re-certification examination is arbitrary and capricious, thereby

constituting a per se violation of the Sherman Antitrust Act.

Applying the "Rule of Reason" analysis specifically to the professions, the Ninth Circuit Court of Appeals stated in Boddicker v. Arizona State Dental Association, 549 F.2d 626 (1977):

> [T]o survive a Sherman Act challenge a particular practice, rule or regulation of a profession . . . must serve the purpose for which the profession exists, viz. to serve the public. Those which only suppress competition between practitioners will fail to survive the challenge.

Consumer protection has always been the highest priority of professional associations and certification agencies (especially those in the health care field). This concept, variously stated, is the purported purpose of NCCPA's existence as set down in their Articles of Incorporation. This concept of consumer protection includes, but is by no means limited to, promotion and assurance of continued

competence. These activities are designed to improve the quality of professional services, thereby aiding consumers in making a rational choice of services on the basis of considerations such as quality, thereby fostering competition among members of a profession.

With regard to the Physician Assistant profession, the definition of "consumer" includes not only patients, but in the main those physicians, clinics, hospitals, and other institutions that might employ the individual physician assistant. Substantively, any "Rule of Reason" analysis should explore whether the objective of the restraint is consistent with the scope of responsibility expected of a profession in serving the various interests of patients, employers, or society, and ascertaining if it is reasonable in this context.

Traditionally, courts have defined per se antitrust offenses as those:

> [B]ecause of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958).

Generally speaking, the mere involvement of an association such as the NCCPA would provide the requisite element of combination or conspiracy, which is required before a group boycott or concerted refusal to deal can constitute a violation of the Sherman Antitrust Act. —15 U.S.C.A. Sections 1 & 2.

The NCCPA re-certification examinations for the years 1981 thru 1983, had no established pass/fail levels (due to a lack of validity and reliability of the examinations used), however, in order to maintain certification, PAs were required to sit for these examinations, and pay the required fees. Since passing these

examinations was [and is not] required, continued competence could [and cannot] be guaranteed, therefore, the public interest was [and is] not served. Only the financial interests of the NCCPA were [and are] served by a [mandatory] re-certification examination wherein failure has no penalty. Simply put, this means re-certification by payment of fees.

In McCreery Angus Farms v. American Angus Ass'n., 379 F.Supp. 1008 (1974)(almost an identical corollary with regard to the instant case). District Judge Harlington Wood, Jr's. Memorandum, Findings of Fact, and Conclusions of Law are quoted in pertinent part for comparison:

> Some of the associations have competing associations, but the American Angus Association does not. It is a complete and absolute monopoly. . . . This Association holds the reputations and the livelihood of its members within its absolute grasp. . . . This is not a local social club, but an association of immense power and importance. With that power and prestige, which the

> Association has developed over the years and no doubt deserves, goes an equal responsibility to clearly define and to use that power fairly and in accordance with at least the minimum requirements of due process. . . . The interstate nature of the Defendant Association is obvious. The Board of Directors is made up of breeders from many states and the Association represents some 60,000 in all fifty states. . . . The Court, however, must not ignore the power that monopolistic private associations exercise over their members. As has been observed by one commentator, 'Since the leaders of groups which have an economic stranglehold are relatively free from control by membership withdrawal, it would seem more important that other controls, such as judicial intervention, be available. . . .'

The corollaries alluded to supra are: The NCCPA has absolutely no competition in the arena of Physician Assistant certification. As in McCreery, the NCCPA is a complete and absolute monopoly that controls the reputations, livelihood, and geographic movement of the profession that is utterly dependent upon its certification

"Seal of Approval". The Board of Directors is composed of representatives from all facets of the medical and physician assistant professions, as-well-as representatives from the United States Department of Defense and the Federation of State Medical Boards of the United States.[1] The NCCPA controls the certification [Right to Work] destinies of over 20,000 physician assistants in all fifty (50) states, the several territories, the Armed Forces, and other Federal Agencies.

The NCCPA, without a doubt, is an absolute monopoly that set out from the beginning to control the certification of the Physician Assistant profession within the United States and its territories. When a certification agency, such as the NCCPA, is no longer responsive to the profession it certifies, the only equitable recourse for members of that profession who are wronged by the agency is in judicial intervention.

Point III.

THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IN AFFIRMING THE DISTRICT COURT'S [PRE-TRIAL] DISMISSAL OF PETITIONER'S ACTION WITH PREJUDICE, AND IN ITS FAILURE TO ADDRESS THE DISTRICT COURT'S FAILURE TO RULE ON PETITIONER'S MOTION FOR LEAVE TO AMEND UNDER RULE 15(a) FED.R.CIV.P., IS CONTRARY TO THIS COURT'S HOLDING IN CONLEY V. GIBSON AND FOMAN V. DAVIS, AND CONFLICTS WITH THE HOLDING OF THE NINTH CIRCUIT IN HURN V. RETIREMENT FUND TRUST AND HOWEY V. UNITED STATES.

In the spirit of Conley v. Gibson, 355 U.S. 41 (1957), Justice Black, speaking for the Court said:

> In appraising the sufficiency of the complaint we follow, of course the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. . . . [t]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon

> which it rests. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

The NCCPA motion to dismiss was so "well pled" that Gilliam immediately realized that his original complaint was flawed. Gilliam filed his motion for leave to amend within ten (10) days of service of NCCPA's motion for dismissal. Three (3) months passed between the time of filing of Gilliam's motion for leave to amend and the District Court's Order for Dismissal. The District Court [for whatever reasons] did not acknowledge Gilliam's motion.

This Court in Foman v. Davis, 371 U.S. 178 (1962) held:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. . . . [i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject

> of relief, he ought to be afforded an opportunity to test his claim on the merits. . . . [O]f course, the, grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

The Ninth Circuit, in Hurn v. Retirement Fund Trust, 648 F.2d 1252, 1254 (9th Cir. 1981) noted:

> Initially, we note that [t]he Supreme Court has instructed the lower federal courts to heed carefully the command of Rule 15(a), F.R.Civ.P., by freely granting leave to amend when justice so requires.

Howey v. United States, 481 F.2d 1187 (9th Cir. 1973), citing Foman supra, held: "[T]he denial of leave to amend was error . . ."

In ignoring or overlooking Gilliam's motion for leave to amend [a motion Gilliam was secure in feeling would be granted, because: "justice so required"] the District

Court violated the spirit of Rule 15(a).

The Third Circuit in its affirmation of the District Court's dismissal is contrary to previous holdings of this Court and conflicts with previous holdings of the Ninth Circuit all supra.

Gilliam, understandably, feels that if his appeal [grounded on denial of leave to amend pursuant to Rule 15(a)] had been docketed in the Ninth Circuit, his appeal would have been granted--reversing the District Court's dismissal and remanding his action for further proceedings on the merits of his Second Amended Complaint.

Point IV.

IN ITS AFFIRMATION OF THE DISTRICT COURT'S DISMISSAL WITH PREJUDICE THE THIRD CIRCUIT HAS IN ESSENCE DENIED PETITIONER HIS "DAY IN COURT" CONTRARY TO THIS COURT'S OPINION [IN PART] IN MARTIN V. WILKS AND ALSO CONFLICTS WITH THE SECOND CIRCUIT'S HOLDING IN DIOGUARDI V. DURNING.

The famous, and somewhat colorful, pro se case of Dioqauardi v. Durning,

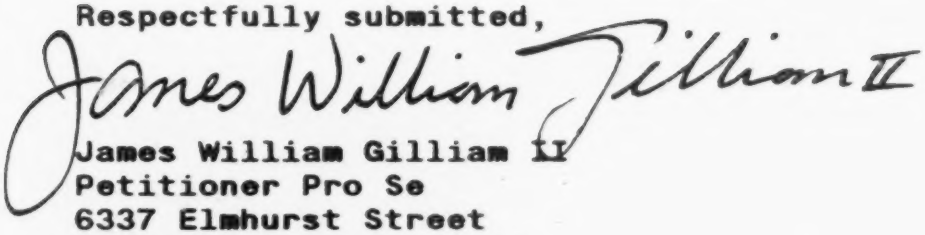
151 F.2d 501 (2d Cir. 1945), instructs, that whether or not a plaintiff ultimately loses on the merits in no way shows that he should be thrown out of court without opportunity to prove those merits. The simple fact of the matter is that Gilliam [a non-attorney, acting pro se] has been denied his "day in court" by the District Court, aided and abetted by the affirmation of the Third Circuit. This "Right" [encompassing every person within the jurisdiction of the United States] is so deeply ingrained in our traditions of American jurisprudence, that Chief Justice Rehnquist, in delivering the opinion of the Court in Martin v. Wilks, No. 87-1614. Argued January 18, 1989 - Decided June 12, 1989 (Slip Opinion), quoted 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, Section 4449, p. 417 (1981)(18Wright):

> "This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court'"

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted. Indeed, Justice would seem to require that it be granted.

Respectfully submitted,



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Dated in Philadelphia, Pennsylvania March 13, 1990. Revised for re-submission to the Court on March 17, 1990.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-1992

GILLIAM, JAMES WILLIAM II,

Appellant

vs.

NATIONAL COMMISSION FOR CERTIFICATION OF PHYSICIAN ASSISTANTS, INC. and PENNSYLVANIA STATE BOARD OF MEDICINE, WIDDOSS, LINDA D., AND DOE, ET AL.,

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On Appeal From the United States District Court For the Eastern District of Pennsylvania (D.C. Civil Action No. 89-1698)
District Judge: Honorable John P. Fullam

Submitted February 9, 1990

BEFORE: HIGGINBOTHAM, Chief Judge, STAPLETON, and SCIRICA, Circuit Judges

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JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Clerk

Dated: Feb 27 1990

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES WILLIAM GILLIAM, II : CIVIL ACTION

v. : FILED
NOV 6 1989

NATIONAL COMMISSION FOR
CERTIFICATION OF PHYSICIAN
ASSISTANTS, INC., et al. : NO. 89-1698

MEMORANDUM AND ORDER

FULLAM, Ch.J. NOVEMBER 6, 1989

Plaintiff is a college-trained health-care professional, and has been employed as a physician's assistant for many years. The defendant National Commission for Certification of Physician Assistants, Inc. ("NCCPA") is a corporation headquartered in Atlanta, Georgia, which, in conjunction with the National Board of Medical Examiners and the host of governmental and medicine-related organizations which formed the NCCPA in the early 1970s, administers a nationwide

testing and certification program for physician assistants.

In order to obtain NCCPA certification as a physician assistant, the applicant must, among other things, pass a standardized certification examination administered by the defendant corporation. When a certificate is issued, it remains valid for six years, but must then be renewed by taking and passing a renewal examination. In addition, during the six-year life of a certificate, the holder is required to re-register it every two years by furnishing proof that he or she has completed at least 100 hours of continuing medical education.

The need for a NCCPA certificate in order to engage in the profession of physician assistant varies greatly from jurisdiction to jurisdiction. In some states, including Pennsylvania, it would be illegal to work as a physician assistant

(with limited exceptions not here pertinent) without a valid, current, NCCPA certificate. In other jurisdictions, such as New York and Delaware, a person who has once been issued an NCCPA certificate can thereafter work as a physician assistant without re-registration or renewal. In still other jurisdictions, a NCCPA certificate is not required for persons who have graduated from accredited educational programs.

Plaintiff Graduated from an accredited educational institution, took and passed the NCCPA examination in 1973, and was issued a certificate in 1974. Unfortunately, however, he allowed his certificate to lapse at the end of its six-year life -- apparently because he was entering the military service, and could work as a physician assistant in the army without current certification.

When plaintiff left military service in 1986, and sought to revive his NCCPA

certificate, he was informed that he would be required to take and pass the same examination as a new applicant, rather than the (somewhat less stringent) renewal examination. Plaintiff was re-tested in 1987. Although he had been continuously employed as a physician assistant for more than 12 years, and was then a highly regarded physician assistant at Temple University Hospital, plaintiff failed the test (he did reasonably well in all parts of the test except demonstrating clinical skills; he did not conduct a simulated routine physical examination to the satisfaction of the examiners). As a result, he was unable to obtain a renewal of his Pennsylvania license. He now works in Delaware, where he is duly licensed.

Plaintiff, acting pro se, has brought this action against NCCPA and the Pennsylvania State Board of Medicine and one of its administrators, Linda D. Widdoss

(hereinafter, the Commonwealth defendants). Plaintiff asserts that his constitutional rights have been and are violated, and that the defendants are in violation of the federal antitrust laws and the Federal Trade Commission statute. He seeks injunctive and other forms of relief. The defendants have filed motions to dismiss.

Plaintiff's claims against NCCPA under the Civil Rights statutes are easily resolved: although its certifications are relied upon by many states in their licensing decisions, NCCPA is a private organization. It receives no financial support from any government, and it operates in all respects on a completely independent basis. In short, it is not a state actor, and does not act under color of state law within the meaning of the Civil Rights Act. Even if plaintiff were able to allege that his constitutional rights have been violated by the NCCPA, he would have no claim

cognizable in this court for such constitutional violation.

I hasten to add that plaintiff's own allegations make clear that no constitutional violation has occurred. He has no vested right to certification, no property entitlement to renewal of his certification or of his license which could form the basis of a claim for violation of due process; and, in any event, he was accorded due process. He has no valid claim under the Equal Protection clause, because he has been treated in precisely the same manner as all others similarly situated; moreover, no racial or other invidious discrimination is, or could be, alleged.

Although the Commonwealth defendants do act under color of state law, the facts alleged by plaintiff disclose that they have not violated his constitutional rights. The Commonwealth of Pennsylvania has a right to enforce its licensing regulations in a

non-discriminatory manner. Insistence upon current NCCPA certification is rationally related to the permissible goals of the regulations, and reliance upon NCCPA testing and certification cannot be deemed arbitrary or capricious.

Finally, it is clear that plaintiff has no valid claims against any of the defendants under the antitrust laws. The Commonwealth defendants are immune from antitrust liability under "state action" principles. In any event, it is self-evident that plaintiff has suffered no injury of the type which the antitrust laws were designed to prevent, and that the conduct alleged on the part of each and all of the defendants does not amount to any violation of the antitrust laws. Although it is unclear just what provisions of the Federal Trade Commission Act, 15 U.S.C. Sections 141 et seq. plaintiff is invoking, and it seems that no violation has

been validly alleged, the matter need not be pursued, since there is no private right of action under that statute.

For all of the foregoing reasons, this action must be dismissed, with prejudice.



IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES WILLIAM GILLIAM, II : CIVIL ACTION

v. :

NATIONAL COMMISSION FOR CERTIFICATION OF PHYSICIAN ASSISTANTS, INC., et al. : NO. 89-1698

O R D E R

AND NOW, this 6th day of November, it is ORDERED:

1. Plaintiff's motion for preliminary injunction is DENIED. —

2. Defendant's motion to dismiss is GRANTED. This action is DISMISSED, WITH PREJUDICE.

/s/ John P. Fullam

Ch.J.

ENTERED: 11/7/89

CLERK OF COURT

Supreme Court, U.S.
FILED
APR 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1496

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

JAMES WILLIAM GILLIAM, II,
Petitioner,

v.

NATIONAL COMMISSION ON CERTIFICATION
OF PHYSICIAN ASSISTANTS, INC., ET AL.
Respondents.

RESPONDENT NCCPA'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BEST AVAILABLE COPY

I. QUESTIONS PRESENTED FOR REVIEW

This case offers very little to review. It was dismissed by the district court after review of a voluminous factual record, and the dismissal was affirmed by the court of appeals, without written opinion, in a judgment order. As a result of the procedural posture of the case, the only material legal issue is as follows:

Did the court of appeals properly affirm the district court's dismissal of this action with prejudice, based upon review of a voluminous factual record, when the petitioner, plaintiff below, had already filed several amendments to his Complaint and had exhaustively described the factual and legal bases for his action, and his own pleadings revealed that

he could not sustain a cognizable cause of action?

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III. STATEMENT OF THE CASE

Petitioner James W. Gilliam, II ("Gilliam"), plaintiff below, is a pro se litigant. He initiated this action against Defendants National Commission on Certification of Physician Assistants, Inc. ("NCCPA")[1], the Commonwealth of Pennsylvania and individual state officers in the United States District Court for the Eastern District of Pennsylvania by filing his Complaint on March 8, 1989. Continuously thereafter, Gilliam purported to supplement and amend his Complaint, without leave of court, by filing numerous and voluminous "briefs," "addenda," "exhibits" and "amendments," wherein he exhaustively described the perceived

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[1]Respondent NCCPA is a private Georgia non-profit corporation. It has no parent or subsidiary companies or corporations.

factual and legal bases for his causes of action.

Upon appropriate motions by each of the Defendants, and after review of the voluminous record, the district court dismissed this action with prejudice by Order entered November 6, 1989. The dismissal was affirmed by the United States Court of Appeals for the Third Circuit, without written opinion, by Judgment Order entered February 27, 1990. Gilliam's Petition for Certiorari seeks review by this Court of the Third Circuit's Judgment Order.

IV. SUMMARY OF ARGUMENT

Petitioner Gilliam is currently a practicing physician assistant in the State of Delaware. This case involves his attempt to obtain a license to practice as a physician assistant in the Commonwealth of Pennsylvania. Among other prerequisites for licensure, Pennsylvania requires a physician assistant to hold an NCCPA certificate or other evidence of a minimally acceptable level of technical knowledge and skills. In this action, Gilliam attempts to assert claims against NCCPA because he allowed his original physician assistant certificate from NCCPA to lapse, and then failed the NCCPA certifying examination when he attempted to reobtain a certificate. After review of the voluminous record of

Gilliam's filings in the district court, the district court properly dismissed the action with prejudice, and the court of appeals correctly affirmed that order.

Gilliam alleges that NCCPA violated his due process rights under the U. S. Constitution and violated federal anti-trust laws in connection with its certification process. The district court and court of appeals, however, correctly determined that Gilliam could not sustain federal constitutional claims against NCCPA, because NCCPA is a wholly private entity not engaged in "state action." In any event, the district court properly concluded that Gilliam has no constitutionally protected interest in an NCCPA certificate and was afforded all requisite due process in the certification process.

The district court and court of appeals also correctly decided that Gilliam has suffered no injury of the type which the antitrust laws were designed to prevent, and that the conduct alleged on the part of NCCPA does not constitute a violation of the antitrust laws. The inability of Gilliam to obtain a license to practice in Pennsylvania is due solely to the statutory and administrative regulations of that state relating to physician assistants, and to Gilliam's allowance of his original certificate to lapse and his subsequent failure of the certification examination.

This case involves only the application of well-settled law to unique facts. It does not present any important question of federal law, nor does the decision of the court of appeals below stand

in conflict with the decision of any other circuit court of appeals or any state court of last resort. As a result, it offers no issue worthy of review by this Court.

V. ARGUMENT

A. Introduction.

This case involves nothing more than the failure by Petitioner Gilliam, for reasons of personal convenience and expedience, to comply with reasonable and consistent policies of NCCPA concerning the maintenance of his physician assistant certificate on an active basis.

Gilliam's Petition does not present issues proper for or worthy of review on

certiorari by this Court. His case involves only the application of already well-settled law to unique facts. The Third Circuit's Judgment Order does not stand in conflict with any decision of this Court or any other United States court of appeals. Consequently, no useful purpose can be served by further consideration of this case by this Court.

B. Statement of Facts.

In his Petition for Writ of Certiorari, Gilliam omits and misstates material facts in the record of the proceedings below. Furthermore, he recites alleged facts and references documents which have never been introduced, properly or otherwise, as evidence in the record of this case. Consequently, NCCPA takes excep-

tion to Gilliam's statement of the factual background of this case.

The district court's Memorandum and Order, however, which has been included within the appendix to Gilliam's petition, contains a generally accurate and succinct recitation of the material facts within the record of this action. Thus, rather than repeating it herein, NCCPA adopts by reference the factual recitation contained within the Memorandum and Order of the district court, and will confine this factual discussion to portions of Gilliam's petition which require specific refutation.

Initially, it is important to clarify the nature of NCCPA's role. It is not, as Gilliam intimates, a professional association. The physician assistant professional association is the American

Academy of Physician Assistants. Rather, NCCPA is a private corporation which designs and administers examinations intended to measure and certify a minimally acceptable level of the technical knowledge and skills required to practice as a physician assistant. It is not controlled by potential competitors of Gilliam. Consequently, the antitrust authorities cited by Gilliam relating to professional associations are simply inapposite.

Further, in his Petition, Gilliam continues his practice from the lower courts of arguing factual allegations which are completely unsupported by any competent evidence in the record. Specifically, the district court determined that there was no evidence in this case that NCCPA is engaged in "state action."

Indeed, it was clearly established that the operations and procedures of NCCPA do not transform it into a "state actor," and that it operates in all respects on a completely independent basis.

The record reveals that NCCPA receives no financial support from any governmental entity, and that no government entity regulates or controls the decisions, methods or procedures of NCCPA. Although Gilliam attempts to make much of the fact that the U. S. Department of Defense and Federation of State Medical Boards of the U. S. ("FSMBUS") have representatives on the NCCPA board of directors, such entities provide only two of the twenty-two directors on the board. Thus, they can in no way be argued to have any controlling influence on the actions of NCCPA. In any event,

FSMBUS is merely a private association of representatives from a variety of state medical boards, which has no official authority to speak or act on behalf of any state. Consequently, its single voice on the board of directors is not tantamount to involvement by any state.

Finally, Gilliam refers to certain documents which have never been introduced in any fashion in the record of this case, e.g. NCCPA Newsletter, Vol 1/No. 2, April 1976; 1976 Resolution of FSMBUS; and letter dated November 8, 1976, from William L. Bost, Jr. to David L. Glazer. NCCPA, of course, objects to any consideration of such materials, or to any facts allegedly derived from them. Aside from the myriad evidentiary defects relating to such materials, they are

simply irrelevant to the material issues of this lawsuit.

Gilliam's Petition blurs the significant difference between certification as a physician assistant by NCCPA and licensure as a physician assistant by any state. NCCPA certification alone does not authorize a physician assistant to practice in any state. Instead, a physician assistant must obtain a state-issued license to practice in any state which regulates the profession. NCCPA certification has no significance beyond that which any given state chooses to accord. Some states recognize NCCPA certification as satisfying one pre-condition to licensure; others do not. Consequently, the ability of any physician assistant to practice in a given state is controlled directly and exclusively by

the statutory and administrative licensure regulations of that state. In this case, NCCPA cannot prevent Gilliam from practicing in Pennsylvania. It is his failure to satisfy the licensure requirements imposed by that Commonwealth which prevents him from practicing there.

VI. CONCLUSION

In conclusion, this case offers no legal issues of such gravity as to merit consideration by this Court. Indeed, the fact that the Court of Appeals for the Third Circuit summarily affirmed the district court's order of dismissal, without written opinion, reveals that that court felt that this case presents no issue of significant substance, much

less an issue of such novelty or complexity as to demand the attention of this Court. Consequently, Respondent NCCPA requests that Gilliam's Petition for Certiorari be denied.

Respectfully submitted this 23rd day of April, 1990.

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CERTIFICATE OF SERVICE

This is to certify that, pursuant to Rule 29.3, I have through my agent caused all parties to this proceeding to be served with three copies of the foregoing Respondent NCCPA's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, before the time of filing same, by first class mail with sufficient postage affixed to ensure delivery, addressed as follows:

Mr. James W. Gilliam, II
6337 Elmhurst Street
Philadelphia, PA 19111

David M. Donaldson, Esq.
Senior Deputy Attorney General
Commonwealth of Pennsylvania
Office of Attorney General
206 State Office Building
Philadelphia, PA 19130

This 23rd day of April, 1990.

Charles H. Ivy, Member of the Bar, U. S. Supreme Court